

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 16 December 2004**

**BALCA Case No.: 2004-INA-115**  
**ETA Case No.: P2002-CA-09530538/VA**

*In the Matter of:*

**INGER MILLER,**  
*Employer,*

*on behalf of*

**VICTORINA OSORIO,**  
*Alien.*

Appearances: Maria Marrero  
Huntington Park, California  
For the Employer and the Alien

Certifying Officer: Martin Rios  
San Francisco, California

Before: Burke, Chapman, and Vittone  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** Inger Miller (“the Employer”) filed an application for labor certification<sup>1</sup> on behalf of Victorina Osorio (“the Alien”) on April 3, 2001. (AF 12).<sup>2</sup> The Employer sought to employ the Alien as a Home Care Aide. This decision is based on the record upon which the Certifying Officer (“CO”) denied certification and the Employer's request for review, as contained in the AF. 20 C.F.R. § 656.27(c).

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<sup>1</sup> Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

<sup>2</sup> In this decision, AF is an abbreviation for Appeal File.

## **STATEMENT OF THE CASE**

The Employer described the job duties as maintaining the home, cooking and serving meals, rendering personal service to family members, cleaning the home, and answering the telephone and doorbell. The Employer required no advanced education and no experience in the job offered. (AF 12).

In the Notice of Findings (“NOF”), issued September 18, 2003, the CO found that the Employer failed to document lawful, job-related reasons for the rejection of a U.S. applicant. The Employer rejected the applicant for lack of cooking skills; however, the Employer required no experience in the job offered. The CO noted that the Employer hired the Alien without any experience and the U.S. applicant must be offered the same terms and conditions of employment as those offered to the Alien. The Employer was advised to submit rebuttal which documents how the U.S. applicant was rejected solely for lawful, job-related reasons. (AF 8-10).

In its rebuttal, dated September 23, 2003, the Employer stated that the U.S. worker was offered the same terms and conditions of employment as offered to the Alien but she did not want to cook. The Employer concluded that she needed someone “willing to learn how to cook.” (AF 5-7).

The CO issued the Final Determination (“FD”) on October 6, 2003, denying the Employer’s application for labor certification. (AF 3-4). The CO found that the Employer provided conflicting reports regarding the recruitment results. In the original report, the Employer reported that she rejected the U.S. applicant for lack of cooking skills. In her rebuttal, she stated that the U.S. applicant refused to cook. The CO found that the Employer’s original statement, which was made contemporaneously with the recruitment period, was more persuasive. The CO did not credit the rebuttal statement. Accordingly, the CO found that the Employer failed to submit evidence that the U.S. applicant was rejected for lawful, job-related reasons. (AF 3-4).

By letter dated October 15, 2003, the Employer requested review by this Board, arguing that the U.S. applicant has been in the field of child care and housekeeping and the applicant never had to do any cooking. (AF 1-2). The Employer stated that the U.S. applicant said she would prefer a job in which she would not have to cook. The Employer concluded that “for this reason we believe that she would not feel comfortable in a job where she would have to cook and we believe if she took the job it would only be temporary until she found another job where she could feel comfortable.” (AF 1). This matter was docketed by the Board on April 5, 2004.

### **DISCUSSION**

The Employer has presented three different reasons for rejecting the U.S. applicant. Initially, the Employer stated that the applicant was rejected because she had no experience cooking. As the job description required no experience, the Employer’s rejection of the applicant for lack of cooking experience was unlawful. An applicant who meets the minimum requirement specified for a job is considered qualified for the job. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991).

On rebuttal, the Employer argued that the applicant did not want to cook. However, the job description clearly included a cooking requirement and thus, it must be assumed that the U.S. applicant did want to cook since she pursued this job opportunity. The Employer provided no documentation to establish that the U.S. applicant stated that she did not want to cook. An employer’s bare assertion, in the absence of supporting reasons or evidence, that a U.S. applicant was not interested in the position is insufficient to prove rejection for a lawful, job-related reason. *Custom Card d/b/a Custom Plastic Card Co.*, 1988-INA-212 (Mar. 16, 1989) (*en banc*).

Finally, with the request for review, the Employer stated that the U.S. applicant would prefer a job in which she would not have to cook. Therefore, the Employer concluded that the applicant would take this job temporarily until she found another job. In general, an employer cannot reject a U.S. applicant based on their conclusion that the

applicant is not interested in a permanent position. The Board has recognized that certain jobs may require lengthy periods of on-the-job training or other factors peculiar to that business or industry that require a commitment of a minimum period of employment. *World Bazaar*, 1988-INA-54 (June 14, 1989) (*en banc*). However, no such factors are present in this case. Thus, the Employer's arguments with her request for review also fail to establish a lawful, job-related reason for rejecting the U.S. applicant. As such, labor certification was properly denied.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of Alien  
Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.